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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5058

DAVID LEVELL W., a minor,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, DAVID LEVELL WALLS, asks leave to file the attached Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Four. Without prepayment of costs and to proceed in forma pauperis pursuant to rule 46 of the United States Supreme Court Rules and 28 USC 1915(a).

The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

QUIN DENVIR
State Public Defender

By _____
STEFFAN INHOFF
Deputy State Public Defender

Attorneys for Petitioner

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, DAVID LEVELL WALLS, being first duly sworn, depose and say that I am the petitioner, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

The petitioner was arrested in his home by two Los Angeles police officers who had neither a warrant nor reasonable or probable cause for his arrest. The sole basis for petitioner's arrest was his mother's consent. The question presented is whether his mother could effectively waive petitioner's Fourth Amendment rights.

/ /

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of these proceedings are true.

1. Are you presently employed? No, I never have been.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Walls David L.
DAVID LEVELL WALLS

Duly witnessed and sworn to before me, a Notary Public, this 8th day of July, 1980.

OFFICIAL SEAL
ADRIAN K. PANTON
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Oct. 21, 1983

Adrian K. Panton
NOTARY PUBLIC (or other notary notation)

80-5058

Supreme Court, U. S.
FILED
JUL 14 1980
MICHAEL RODAK, JR., CLERK

80-5058

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NO. 80-

DAVID LEVELL W., a minor,

Petitioner,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

QUIN DENVIR
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IN THE

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OCTOBER TERM, 1980

NO. 80-

DAVID LEVELL W., a minor,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

QUESTION PRESENTED

Whether the police violate a young man's Fourth Amendment rights when they arrest him, in his home, without a warrant, and without reasonable or probable cause, solely on the basis of his mother's consent?

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OCTOBER TERM, 1980

NO. 80-

DAVID LEVELL W., a minor,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Petitioner, DAVID LEVELL W., respectfully prays that a writ of certiorari issue to review the majority opinion of the California Court of Appeal which affirmed the juvenile court's holding that the petitioner's warrantless arrest, although without probable cause, was nevertheless lawful because it was consented to by his mother.

OPINIONS BELOW

The majority and dissenting opinion of Division Four, Second Appellate District, California Court of Appeal, is set forth as Appendix A to this petition. It is also reported as In re David W., 103 Cal.App.3d 469, 163 Cal.Rptr. 87 (1980). A copy of that court's order denying our petition for rehearing is set forth as Appendix B. A copy of the California Supreme Court's order denying our petition for hearing is set forth as Appendix C.

JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C. section 1257(3) since a right is claimed under the Fourth Amendment to the Constitution of the United States.

The California Court of Appeal entered its order rejecting petitioner's Fourth Amendment claim on March 18, 1980, and denied petitioner's request for rehearing on April 7, 1980.

The Supreme Court of California denied hearing in this case on May 14, 1980. The instant Petition for a Writ of Certiorari is filed within sixty days of that order. (Rules of the Supreme Court of the United States, effective June 30, 1980, rule 20.1.)

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

STATEMENT OF THE CASE

A. History of the Case

On March 9, 1979, a petition was filed in the juvenile division of the Los Angeles County Superior Court under California Welfare and Institutions Code section 602 alleging that the petitioner violated California Penal Code section 459, burglary, a felony (CT 8).[1/]

---

1. Reference is to the Clerk's Transcript of the juvenile court's proceeding.

/ /

On April 16, 1979, the juvenile court conducted a combined motion to suppress and adjudication hearing. The minor moved to suppress his confession on the grounds, inter alia, that it was the product of an unlawful warrantless arrest, without probable cause, in violation of his Fourth Amendment rights. The court denied the motion to suppress, and found that the petition was true. Thus, the minor was found to be a person described by section 602 of the California Welfare and Institutions Code (CT 13).

On April 30, 1979, a dispositional hearing was held before the juvenile court. The minor was ordered removed from the custody of his mother. Physical confinement was set at a maximum period of two years (CT 14).

Petitioner appealed the wardship order of the juvenile court to the California Court of Appeal, Second Appellate District. Petitioner's major contention on appeal was that his confession was tainted in that it resulted from an unlawful, warrantless arrest, in violation of his state and federal constitutional rights. On March 18, 1980, Division Four of that court affirmed the judgment and order of the juvenile court in a published decision set forth in Appendix A. Justice Jefferson dissented from the opinion. The court's majority opinion rejected the petitioner's claim that his Fourth Amendment rights had been violated. A petition for rehearing was denied on April 7, 1980.

The California Supreme Court denied a petition for hearing on May 14, 1980. Justices Tobriner and Newman were of the opinion that the petition should be granted. (California Supreme Court Notes, May 14, 1980.)

B. Statement of the Facts

On March 8, 1979, petitioner was arrested while in his home without a warrant or probable cause, by two Los Angeles police officers. The facts leading up to this arrest are taken

from the Factual Summary in the majority opinion of the California Court of Appeal:

"At the hearing on the pretrial motion to suppress evidence, Gregory Johnson testified that he is a police officer for the City of Los Angeles. On March 8, 1979, he was told by Investigator Tietgen that Tietgen had been in contact with appellant's mother 'concerning one of her children who allegedly had been involved in a burglary of a house down the street, and she was to bring him in and she had failed to do so.' Tietgen requested that Johnson and Officer Tyler go to the woman's home and find out when she would bring the minor in to the police station.

"The officers went to the minor's home at approximately 8 a.m. on that day. In response to their knock on the front door, a young boy, age 10 to 12, answered the door. The officers were in uniform, identified themselves, and asked to speak to his mother. The boy asked them to wait a minute, and the officers waited on the porch while he went toward the back of the house.

"The boy returned to the door within a short time and said, 'My mother wants you to come in.' He directed them to a bedroom, where they saw appellant's mother lying in bed. The officers explained the purpose for their visit, and asked the woman why she had not brought her son to the station the day before, as she had said she was going to do. She explained that her car

had broken down. Officer Johnson asked, 'Can you bring him in today?' and she responded that she could not because her car was still not working. She then pointed out appellant, who was sleeping in another bed in the same room, and called to him to wake up. Johnson asked the woman when she would be able to bring appellant down to the station, and she said, 'Well, you officers are here. You can take him down.' She told the officers she had been having trouble with her son, and that if he had been involved in a burglary, she wanted to know about it because she would contact his probation officer. She then told the officers to take the appellant to the station.

"Appellant's mother told appellant to get out of bed and get dressed because the officers were waiting for him. The minor, who was then 13 years of age, complied. Once he was dressed, he left with the officers and they drove him to Newton Station. Before the minor got into the police car, he was handcuffed by Johnson to prevent him from jumping out of the car en route.

"At the station, the minor was read and had explained to him his Miranda rights, waived his rights, and confessed to the burglary."

REASONS FOR GRANTING THE WRIT

ARGUMENT

A YOUNG MAN'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE ARREST CANNOT BE WAIVED BY HIS MOTHER

The facts in this case are undisputed and clearly frame the question presented. Two uniformed Los Angeles police officers came to petitioner's home without reasonable or probable cause to arrest or detain petitioner.

The respondent conceded that there was no evidence introduced at the motion to suppress to establish probable cause to arrest the petitioner (Appendix A, p. 5). Based solely on his mother's consent, petitioner, a 13-year-old minor, was handcuffed and taken to the police station for questioning, where he confessed to participating in the charged offense.

The juvenile court and California Court of Appeal found that the police had not violated the petitioner's Fourth Amendment rights. The majority decision of the California Court of Appeal holds that a minor may be arrested in his own home without a warrant or reasonable or probable cause if his mother consents to the arrest. Thus, a parent is given the absolute right to waive her child's Fourth Amendment protection against unreasonable arrests. The petitioner is aware of no other decision where it has been held that one person may waive another person's right to be free from an unreasonable arrest under the Fourth Amendment. The majority opinion cites no federal authority for this novel view, but simply relies on a parent's general right to supervise and control her child.

In In re Scott K., 24 Cal.3d 395, 155 Cal.Rptr. 671, 595 P.2d 105 (1979), the California Supreme Court held that a father may not waive his son's constitutional right to be free from an unreasonable search. That decision relied extensively on decisions of this Court which recognize the constitutional rights of juveniles.

In the instant case, Justice Jefferson, in his dissenting opinion, persuasively argued to why the decisions of this Court, as applied in Scott K., compel the conclusion that the petitioner's arrest was unlawful.[2/]

> "I start with the premise set forth in Dunaway v. New York (1979) ___ U.S. ___, 60 L.Ed. 2d 824, 838, in which the court observed 'that detention for custodial interrogation -- regardless of its label -- intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.' In the case at bench, the minor's removal and transfer from his home to the police station by the police officers constituted a clear case of 'detention for custodial interrogation.' The inexorable result was that the minor was entitled to the safeguards against an illegal arrest. The facts demonstrate clearly that this was a warrantless detention which was not based upon any probable cause for arrest. It follows, therefore, that if this warrantless detention is to be constitutionally justified, it must be predicated upon the mother's consent and direction to the officers to take her 13-year-old boy into custody.
>
> "The majority takes the view that the principle of parental control of parents over their children justified the direction from the minor's

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2. The citations and footnote from In re Scott K., supra, omitted from Justice Jefferson's dissenting opinion are included herein.

mother to the police officers to detain and arrest the minor and take him to the police station. The decisional law, however, has made it crystal clear that the supervisory authority and control of parents over their children are not unlimited. It appears to be the majority's position that a 13-year-old minor possesses no independent constitutional rights to due process of law or against unreasonable seizure of his person. I consider the holding of the majority in the case before us to be contrary to the current trend in the law which recognizes that minors have some fundamental constitutional rights which cannot be overriden by parents.

". . . . . .

". . . 'Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.' (Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52, 74.)

"In In re Scott K. (1979) 24 Cal.3d 395, 401, our state high court made clear that '[m]inors are, however, persons under our Constitution possessed of rights that governments must respect.[4/] (Tinker v. Des Moines School Dist.

"4/ Minors are 'entitled to constitutional protection for freedom of speech, Tinker v. Des Moines School District, 393 U.S. 503 (1969) [21 L.Ed.2d 731, 89 S.Ct. 733], West Virginia State

(1969) 393 U.S. 503, 511 [21 L.Ed.2d 731, 740, 89 S.Ct. 733].) Fourth Amendment protection may be inferrable from the court's recognition of minor's rights to privacy, e.g., a state may not condition a minor's decision to have an abortion on parental consent (Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52 [49 L.Ed. 2d 788, 96 S.Ct. 2831]); nor may it because of

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Board of Education v. Barnette, 319 U.S. 624 (1943) [87 L.Ed. 1628, 63 S.Ct. 1178]; equal protection against racial discrimination, Brown v. Board of Education, 347 U.S. 483 (1954) [98 L.Ed. 873, 74 S.Ct. 686]; due process in civil contexts, Goss v. Lopez, 419 U.S. 565 (1975) [42 L.Ed.2d 725, 95 S.Ct. 729]; and a variety of rights of defendants in criminal proceedings, including the requirement of proof beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970) [25 L.Ed.2d 368, 90 S.Ct. 1068], the prohibition of double jeopardy, Breed v. Jones, 421 U.S. 519 (1975) [44 L.Ed.2d 346, 95 S.Ct. 1779], the rights to notice, counsel, confrontation and cross-examination, and not to incriminate oneself. In re Gault, 387 U.S. 1 (1967) [18 L.Ed.2d 527, 87 S.Ct. 1428], and the protection against coerced confessions, Gallegos v. Colorado, 370 U.S. 49 (1962) [8 L.Ed.2d 325, 82 S.Ct. 1209]; Haley v. Ohio, 332 U.S. 596, (1948) [92 L.Ed. 224, 68 S.Ct. 302].' (Carey v. Population Services International, supra, 431 U.S. 678, 692, fn. 14 [52 L.Ed.2d 675, 689, 97 S.Ct. 2010, 2020].)"

youth restrict one's access to contraceptives (Carey v. Population Services International, supra, 431 U.S. 678).'

"I recognize that In re Scott K. also set forth the principle that '[b]y no means are the rights of juveniles coextensive with those of adults. (See In re Roger S. (1977) 19 Cal.3d 921, 928 [141 Cal.Rptr. 298, 569 P.2d 1286].) Minors' rights are often legitimately curtailed when the restriction serves a state's interest in promoting the health and growth of children.' (See Prince v. Massachusetts (1944) 321 U.S. 158, 168-170 [88 L.Ed. 645, 653-655, 64 S.Ct. 438]; Ginsberg v. New York (1968) 390 U.S. 629, 638 [20 L.Ed.2d 195, 203, 88 S.Ct. 1274].)

"That the principles set forth in In re Scott K. mandate a holding in the case at bench that the minor was illegally detained and arrested in spite of the mother's direction to the police officers is found in an observation by the In re Scott K. court. After pointing out that minors' rights may be legitimately curtailed when a restriction serves a state's interest in promoting the health and growth of children, the court cogently observed: 'Search and seizure laws, however, hardly seem disruptive or otherwise inconsistent with the state's interest in child welfare. It is established that minors have a liberty interest that entitles them to due process whenever a state initiates action to deprive them of liberty. (In re Gault, supra, 387 U.S. 1; Goss v. Lopez (1975) 419 U.S. 565, 574 [42 L.Ed.2d 725,

734, 95 S.Ct. 729]; In re Winship (1970) 397 U.S. 358, 367 [25 L.Ed.2d 368, 377, 90 S.Ct. 1068]; In re Roger S., supra, 19 Cal.3d 921; In re Arthur N. (1976) 16 Cal.3d 226 [127 Cal.Rptr. 641, 545 P.2d 1345].) Enforcement of search and seizure protection helps ensure that the fact-finding process conforms with standards of due process. . . ." (Appendix A, pp. 15-19.)

While Scott K. rejected a consent principal as applied to searches, it necessarily follows that a parent cannot consent to her child's unlawful warrantless arrest. A seizure of a person constitutes at least as great an intrusion on personal liberty as a seizure of property. (Payton v. New York (1980) ___ U.S. ___, 63 L.Ed.2d 639, 100 S.Ct. 1371.)

CONCLUSION

The majority decision of the California Court of Appeal holds that a mother's right of supervision and control over her child outweighs her son's constitutional right to be free from unreasonable search and seizure. The power of a parent to consent to her son's arrest is a disruptive weapon which acts to undermine family relationships rather than support them. In giving parents this unprecedented right, the instant decision goes directly against the current trend in this Court to recognize that minors have constitutional protections independent of their parents. Thus, the decision reaches, and wrongly decides, an important federal question that has not been, but should be, settled by this Court. (Rules of the Supreme Court of the United States, effective June 30, 1980, rule 17.1(c).)

DATED: July 9, 1980

Respectfully submitted,

QUIN DENVIR
State Public Defender

By _____
STEFFAN IMHOFF
Deputy State Public Defender

Attorneys for Petitioner

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re DAVID W., a Person Coming under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent, v. DAVID W., a minor, Defendant and Appellant.	2 Crim. No. 35263 (Super. Ct. No. J 006299)

COURT OF APPEAL-SECOND DIST.
FILED
MAR 18 1980
CLAY ROBBINS, JR. Clerk
Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Terry J. Hatter, Jr., Judge. Affirmed.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, and Gretchen Dumas, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Shunji Asari and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

David W., a minor, has appealed from an order for "suitable placement," upon the court sustaining a petition (under Welf. & Inst. Code, § 602), which alleged that he had committed a felony, to wit, burglary, in violation of Penal Code section 459.[1/]

The minor confessed to the burglary charge after having been taken to the police station by police officers at his mother's request. Evidence of that confession forms the basis for the order sustaining the petition. The principal contention urged in this appeal is that the minor was illegally arrested and, therefore, the confession should have been suppressed. We reject this contention.

Factual Summary

At the hearing on the pretrial motion to suppress evidence, Gregory Johnson testified that he is a police officer for the City of Los Angeles. On March 8, 1979, he was told by Investigator Tietgen that Tietgen had been in

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1/ Appellant's opening brief states that he appeals from the order entered April 30, 1979 (the burglary offense described above) and the order entered February 6, 1979, wherein the minor was placed on probation for having committed the offense of grand theft on December 13, 1978. The time for filing a notice of appeal from the February 6 order expired on April 7, 1979, 60 days from the service of notice of entry of the order on the minor. (Cal. Rules of Court, rule 2.) We therefore treat the appeal as having been taken from the April 30, 1979, order only.

contact with appellant's mother "concerning one of her children who allegedly had been involved in a burglary of a house down the street, and she was to bring him in and she had failed to do so." Tietgen requested that Johnson and Officer Tyler go to the woman's home and find out when she would bring the minor in to the police station.

The officers went to the minor's home at approximately 8 a.m. on that day. In response to their knock on the front door, a young boy, age 10 to 12, answered the door. The officers were in uniform, identified themselves, and asked to speak to his mother. The boy asked them to wait a minute, and the officers waited on the porch while he went toward the back of the house.

The boy returned to the door within a short time and said, "My mother wants you to come in." He directed them to a bedroom, where they saw appellant's mother lying in bed. The officers explained the purpose for their visit, and asked the woman why she had not brought her son to the station the day before, as she had said she was going to do. She explained that her car had broken down. Officer Johnson asked, "Can you bring him in today?" and she responded that she could not because her car was still not working. She then pointed out appellant, who was sleeping in another bed

in the same room, and called to him to wake up. Johnson asked the woman when she would be able to bring appellant down to the station, and she said, "Well, you officers are here. You can take him down." She told the officers she had been having trouble with her son, and that if he had been involved in a burglary, she wanted to know about it because she would contact his probation officer. She then told the officers to take the appellant to the station.

Appellant's mother told appellant to get out of bed and get dressed because the officers were waiting for him. The minor, who was then 13 years of age, complied. Once he was dressed, he left with the officers and they drove him to Newton Station. Before the minor got into the police car, he was handcuffed by Johnson to prevent him from jumping out of the car en route.

At the station, the minor was read and had explained to him his Miranda rights, waived his rights, and confessed to the burglary.

Discussion

Appellant suggests that the court erred in not finding he was illegally arrested when the officers took him to the police station for questioning, because no evidence was introduced establishing probable cause to arrest him at

the time he was transported, and because no showing was made that he consented to being taken there.

Respondent concedes that no evidence was introduced at the hearing on the motion to suppress which establishes probable cause to arrest appellant when the officers went to appellant's home to talk to his mother. And it is true that, under ordinary circumstances, absent the consent of a suspect, his transportation to the police station for investigation is tantamount to an arrest, thus calling into play the Fourth Amendment safeguards. (Dunaway v. New York (1979) _____ U.S. _____, 60 L.Ed.2d 824, 99 S.Ct. _____.) However, we conclude that the failure to show the minor's personal consent is not dispositive here.

The facts of this case are unusual, and our inquiry does not involve standard issues of consent or waiver of Fourth Amendment rights. This is so because the officers made no demand of the minor requiring consent. Appellant's mother asked the officers to take him to the police station, and told the minor to accompany them. The uncontradicted evidence presented at the hearing was that the minor obeyed his mother, without protest. Likewise, the officers complied with the mother's request. There is nothing in the record to indicate that they ever suggested that they take the boy in,

or that that was their intent at any time prior to the mother's request. Their stated purpose for visiting appellant's home was not even to talk to the minor, but to inquire of his mother as to when she intended to bring him down to the station, as she had previously offered to do.

California courts have long recognized and acknowledged the supervisorial authority and control of parents over their children. (See, for example, Vandenberg v. Superior Court (1970) 8 Cal.App.3d 1048, 1055; In re Robert H. (1978) 78 Cal.App.3d 894, 898; People v. Egan (1967) 250 Cal.App.2d 433, 436; People v. Daniels (1971) 16 Cal.App.3d 36, 42.)

In assessing the right of a parent to consent to the commitment of a minor child to a state mental hospital, the California Supreme Court observed in In re Roger S. (1977) 19 Cal.3d 921, 928:

"Parents, of course, have powers greater than that of the state to curtail a child's exercise of the constitutional rights he may otherwise enjoy, for a parent's own constitutionally protected 'liberty' includes the right to 'bring up children' (citation), and to 'direct the upbringing and education of children.' (Citation.) As against the state, this parental duty and right is subject to limitation only 'if it appears that parental decisions will jeopardize the

health or safety of the child, or have a potential for significant social burdens.' (Citation.)."

Appellant contends that the foregoing authority is undermined by the recent California Supreme Court opinion in In re Scott K. (1979) 24 Cal.3d 395, which held invalid a father's consent to the search of a locked tool box owned by the son. We do not so interpret the Scott K. decision. Rather, that opinion renders a narrow holding based on its own facts. After a discussion of the rights of juveniles and the general rules concerning third-party consent, and citing without disapproval In re Roger S., supra, 19 Cal.3d 921, People v. Egan, supra, 250 Cal.App.2d 433, and People v. Daniels, supra, 16 Cal.App.3d 36, the court in the Scott K. case concludes at pages 404-405:

"The trial court here held that the father's authority was based on the combined circumstance of his ownership of the home and his duty to control his son. Yet neither fact shows the requisite link between the father's interest and the property inspected. Common authority over personal property may not be implied from the father's proprietary interest in the premises. . . . [¶] Here the People did not establish that the consenting parent had a sufficient interest under search and seizure law. The father claimed no interest in the box or

its contents. He acknowledged that the son was owner, and the son did not consent to the search."

We reject appellant's contention that Scott K., a decision based on proprietary interest in property, overruled sub silentio cases recognizing a parent's "responsibility and authority for the discipline, training and control of his children." (Vandenberg v. Superior Court, supra, 8 Cal.App.3d at p. 1055.)

We conclude that no constitutional violation occurred when the appellant (a 13-year-old boy) and the police officers both complied with the mother's request that he be taken to the station for investigation. Therefore, the trial court properly denied the motion to suppress the minor's confession.

Additional Point Raised

In a supplemental brief, appellant asserts that he is entitled to credit against his term of confinement for 53 days actually spent in presentence custody and 27 days' good time credit.

At the disposition hearing in this case, the court declared the offense to be burglary of the second degree, ordered that any physical confinement not exceed two years, and placed the minor in the custody of the probation officer for " suitable placement" pursuant to Welfare and Institutions

Code section 727.[2/] Under that section, the probation officer may select a foster home or boarding home for placement of the minor, as the probation officer sees fit.[3/]

A minor is entitled to credit against his term of confinement, for any time actually spent in custody prior to sentence. (In re Eric J. (1979) 25 Cal.3d 522, 536.) That credit is deducted from any time which the minor is required to serve in physical confinement pursuant to the disposition order. (In re Eric J., supra, 25 Cal.3d at p. 536; Welf. & Inst. Code, § 726; Pen. Code, § 2900.5.) Physical confinement is defined in section 726 as "placement in a juvenile hall, ranch, camp, forestry camp or secure juvenile home pursuant to section 730, or in any institution operated by the Youth Authority."

2/ Unless otherwise stated, all further references to code sections are to the Welfare and Institutions Code.

3/ Section 727 expressly states that it applies to dependent children or minors adjudged wards of the court pursuant to section 601. However, the court is authorized by section 730 to utilize, in "sentencing" a minor adjudged a ward of the court under section 602, the provisions of section 727, in addition to the other restrictive commitments listed in section 730.

Suitable placement of a minor in a foster home or boarding home is not a commitment to physical confinement. Commitments involving physical confinement must be selected and ordered by the juvenile court judge. In In re Debra A. (1975) 48 Cal.App.3d 327, the court declared the minor a ward of the court pursuant to section 602, and ordered her suitably placed at the home of her aunt, "with the exception that the minor shall be placed in a juvenile home, ranch, camp, forestry camp, or county juvenile hall from Saturday at 5 p.m. to Monday at 8 a.m. for five consecutive weekends . . . determined by the probation officer." (Id. at pp. 328-329.) The appellate court held at page 330:

"The juvenile court judge may not delegate to a probation officer his discretion to determine the place of detention over the five weekends as ordered."

The court may, however, delegate to the probation officer the discretion to choose the foster home or boarding home which would be most suitable for the minor, since no physical confinement is involved in that placement. Because the minor was not committed to any of the facilities described in section 726, he is not entitled to any presentence credit against the time spent at the home chosen by the probation officer.

Nonetheless, we will proceed to compute the number of days' credit to which the minor would be entitled, if so confined, because of the possibility that circumstances may change. Under section 777, the probation officer has the right to file a supplemental petition at any time, should he determine that the previous court order has not been effective in the rehabilitation of the minor. He may request, and the court may order, that the minor be committed to physical custody. The minor would then be entitled to presentence credit as hereinafter set out.

Appellant has miscalculated the number of days' presentence credit to which he would be entitled. The record reflects that the minor was taken into custody on March 8, 1979. On March 28, 1979, he was released to his father when the adjudication hearing was continued because of the failure of the People's witnesses to appear. On April 16, 1979, after the petition was sustained, the minor was again detained at juvenile hall. He therefore spent a total of 36 days in presentence confinement, for which he would be entitled to credit.

Appellant further contends that he is entitled to 27 days' good time credit. Although the California Supreme Court has recently acknowledged the right of a sentenced felon

to presentence conduct credit (People v. Sage (1980) _____ Cal.3d _____), the Legislature has expressly provided that no such credit shall be given to juvenile offenders. Subdivision (c) of section 726 provides in part:

"As used in this section and in Section 731, 'maximum term of imprisonment' means the longest of the three time periods set forth in paragraph (2) of subdivision (a) of Section 1170 of the Penal Code, but without the need to follow the provisions of subdivision (b) of Section 1170 of the Penal Code or to consider time for good behavior or participation pursuant to Sections 2930, 2931, and 2932 of the Penal Code, plus enhancements which must be proven if pled."

In discussing this provision, the California Supreme Court observed in In re Eric J., supra, 25 Cal.3d at page 536:

"[I]t may be noted the statute expressly states the minor's maximum term is not to be reduced by 'time for good behavior or participation pursuant to Sections 2930, 2931, and 2932 of the Penal Code,' suggesting that precommitment credit would also have been expressly excluded, had that been the Legislature's intent." (Emphasis in the original.)

We therefore conclude that should the appellant be

physically confined within the meaning of section 726 he is entitled to 36 days' presentence credit, to be deducted from any period of physical confinement he may be required to serve, and is not entitled to presentence conduct credit.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

BURKE (Michael L.), J.*

I concur:

KINGSLEY, Acting P.J.

---

* Assigned by the Chief Justice of California.

JEFFERSON (Bernard), J.

I dissent.

I disagree with the majority's holding that the minor was neither illegally detained nor arrested when the officers took him to the police station for questioning -- based upon the mother's request and consent that he be taken from the home by the officers. It is my view that the minor was in fact arrested, and illegally so, when he was taken from his mother's home and transported in handcuffs to the police station. The fact that the officers state they used handcuffs to prevent the minor from escaping is an irrelevant consideration to the issue involved. It is also my view that the minor's confession -- made following an alleged Miranda warning and waiver -- was the product of an illegal arrest. As such, it was tainted with such illegality and was thus made inadmissible.

But even if the arrest were to be considered valid, the minor's confession should be held to have been illegally obtained on the basis that nothing short of providing a 13-year-old minor with an attorney should be constitutionally tolerated to permit the introduction of the evidence of a confession obtained by police

interrogation of such a minor. Finally, I disagree with the majority's holding that the minor was not entitled to credit for presentence good behavior.

I

The Illegality of the Minor's Detention and Arrest

I start with the premise set forth in Dunaway v. New York (1979) ___ U.S. ___, 60 L.Ed.2d 824, 838, in which the court observed "that detention for custodial interrogation -- regardless of its label -- intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." In the case at bench, the minor's removal and transfer from his home to the police station by the police officers constituted a clear case of "detention for custodial interrogation." The inexorable result was that the minor was entitled to the safeguards against an illegal arrest. The facts demonstrate clearly that this was a warrantless detention which was not based upon any probable cause for arrest. It follows, therefore, that if this warrantless detention is to be constitutionally justified, it must be predicated upon the mother's consent and direction to the officers to take her 13-year-old boy into custody.

The majority takes the view that the principle of parental control of parents over their children justified the direction from the minor's mother to the police officers to detain and arrest the minor and take him to the police station. The decisional law, however, has made it crystal clear that the supervisory authority and control of parents over their children are not unlimited. It appears to be the majority's position that a 13-year-old minor possesses no independent constitutional rights to due process of law or against unreasonable seizure of his person. I consider the holding of the majority in the case before us to be contrary to the current trend in the law which recognizes that minors have some fundamental constitutional rights which cannot be overridden by parents.

Thus, in In re Roger S. (1977) 19 Cal.3d 921, the court recognized the significant trend of giving minors constitutional rights which cannot be waived by their parents by enunciating a holding imposing a limitation upon the right of a parent to have a minor committed to a state hospital. The court stated: "We have concluded that although the personal liberty interest of a minor is less comprehensive than that of an adult, and a parent or guardian not only may but must

curtail that interest in the proper exercise of his obligation to guide the child's development, in the area of admission to a state hospital a minor of 14 years or more possesses rights which may not be waived by the parent or guardian. Among these rights is the right guaranteed under the Fourteenth Amendment to the United States Constitution, and article I, section 7(a) of the California Constitution, to procedural due process in determining whether the minor is mentally ill or disordered, and whether, if the minor is not gravely disabled or dangerous to himself or others as a result of mental illness or disorder, the admission sought is likely to benefit him." (In re Roger S., supra, 19 Cal.3d 921, 927; fn. omitted.)

The Roger S. court also points out that the right of a minor to constitutional rights and protection -- a right which necessarily affects parental control -- has been reaffirmed by the United States Supreme Court. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." (Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52, 74.)

In In re Scott K. (1979) 24 Cal.3d 395, 401, our state high court made clear that "[m]inors are, however, persons under our Constitution possessed of rights that governments must respect. [Citation.] Fourth Amendment protection may be inferrable from the court's recognition of minors' rights to privacy, e.g., a state may not condition a minor's decision to have an abortion on parental consent [citation]; nor may it because of youth restrict one's access to contraceptives [citation]." (Fn. omitted.)

I recognize that In re Scott K. also set forth the principle that "[b]y no means are the rights of juveniles coextensive with those of adults. [Citation.] Minors' rights are often legitimately curtailed when the restriction serves a state's interest in promoting the health and growth of children." (Id. at p. 401.)

That the principles set forth in In re Scott K. mandate a holding in the case at bench that the minor was illegally detained and arrested in spite of the mother's direction to the police officers is found in an observation by the In re Scott K. court. After pointing out that minors' rights may be legitimately curtailed when a restriction serves a state's interest

in promoting the health and growth of children, the court cogently observed: "Search and seizure laws, however, hardly seem disruptive or otherwise inconsistent with the state's interest in child welfare. It is established that minors have a liberty interest that entitles them to due process whenever a state initiates action to deprive them of liberty. [Citations.] Enforcement of search and seizure protection helps ensure that the factfinding process conforms with standards of due process. [¶] Justice should not be compromised by well-intentioned aims to correct transgressing youths, and the rehabilitative value of treating juveniles with fairness must not be underrated." (In re Scott K., supra, 24 Cal.3d 395, 402.) (Emphasis added.)

Since the minor's arrest and detention were illegal, his confession, secured after Miranda warnings and a waiver thereof, should be held to be inadmissible as the fruit of such illegality. (Wong Sun v. United States (1963) 371 U.S. 471.) The Wong Sun court set forth the basic test to guide us in the determination of whether evidence subsequent to an illegal arrest is to be deemed the product of such illegal arrest and admissible by posing the issue to be: "'[W]hether, granting establishment of the primary illegality, the evidence

to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" (Wong Sun, supra, 371 U.S. 471, 488.)

II

Any Interrogation of a 13-Year Old Minor in the Absence of Counsel Should Be Held Invalid Irrespective of Miranda Warnings and a Waiver Thereof

In the case at bench, it is revealed that, after the minor's detention and arrest, he was given the usual Miranda warnings and made a waiver thereof. It was only after such warnings and waiver that the minor confessed to the grand theft offense ultimately charged against him. Although the inadmissibility of the minor's confession may validly be placed upon the ground that such evidence was inadmissible as the fruit of the illegal arrest and detention, there exists a second ground of inadmissibility which is not dependent upon the question of the legality of the arrest and detention.

The assumption is made that a 13-year-old minor stands in the position of an adult insofar as the principle of law is concerned that a suspect may waive his constitutional right to remain silent and to have an attorney pursuant to the requirements of Miranda. Such

a principle of law should have no application to a 13-year-old minor. Irrespective of what the Supreme Court of the United States might hold with respect to the rights of minors under the federal Constitution, I am of the opinion that the California Constitution should be interpreted to preclude the application of a Miranda waiver to any minor who is not more than 13 years of age. It is an erroneous assumption to couch a principle of law in terms that such a minor is capable of understanding the constitutional rights involved in the Miranda warnings and in holding that he has the capacity to intelligently and knowingly waive such rights.

It is my view that such a waiver of constitutional rights should be held to be impermissible with respect to such a minor. I would interpret the California Constitution to provide that no interrogation by the police should be permitted of a minor 13 years of age or younger in the absence of counsel. It should be mandatory that an attorney be appointed for any such minor, and that no interrogation of such minor by a police officer be permitted unless there is a waiver by the minor upon advice of counsel appointed for such minor. It is my position that a mandatory appointment of counsel for a minor no more than 13 years of age

should be a prerequisite under the California Constitution for the validity of any waiver of the right to remain silent.

I recognize that in some respects the doctrine of Miranda has been relaxed, rather than strengthened. Thus, if it is believed that a victim's life hangs in the balance, a defendant may be interrogated about the victim's whereabouts without giving the Miranda warnings. "While life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent." (People v. Dean (1974) 39 Cal.App.3d 875, 882; see, also, People v. Modesto (1965) 62 Cal. 2d 436, 446; People v. Riddle (1978) 83 Cal.App.3d 563, 572.) But in the situation presented in the case at bench of a 13-year-old minor, the Miranda protection should be strengthened by a mandatory requirement of appointment of counsel before any attempt is made by police officers to secure statements from such a minor. Since no counsel was appointed for the minor in the case at bench, I would hold that the minor's confession should be deemed inadmissible under the appropriate provisions of the California Constitution.

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III

The Minor Is Entitled to Presentence Conduct Credit

The majority recognizes that the minor before us is entitled to credit against his term of confinement for any time spent in custody prior to the disposition confinement. (In re Eric J. (1979) 25 Cal.3d 522.) Although physical confinement is defined in Welfare and Institutions Code section 726, subdivision (c), as "placement in a juvenile hall, ranch, camp, forestry camp or secure juvenile home pursuant to Section 730, or in any institution operated by the Youth Authority," I fail to see how placement of a minor in a foster home or boarding home does not constitute an actual physical confinement. Any placement outside of the minor's own home should be held to constitute a confinement against which presentence custody and conduct time should be credited.

The majority recognizes that the California Supreme Court in People v. Sage (1980) ___ Cal.3d ___, held that a felon sentenced to prison has the right to receive conduct credit for presentence custody time. It is true that the Legislature has expressly provided that no such credit shall be given to juvenile offenders. In

In re Eric J., supra, 25 Cal.3d 522, 536, the court made the observation with respect to Welfare and Institutions Code section 726, subdivision (c), that "it may be noted the statute expressly states the minor's maximum term is not to be reduced by 'time for good behavior or participation pursuant to Sections 2930, 2931, or 2932 of the Penal Code,' suggesting that precommitment credit would also have been expressly excluded, had that been the Legislature's intent." (Emphasis in original.)

I am unable to square the principles of equal protection of the laws discussed and approved in Sage with a recognition of any validity to Welfare and Institutions Code section 726, which precludes allowance to a minor of presentence conduct credit which is allowed to felons and misdemeanants.

I would thus hold that Welfare and Institutions Code section 726, subdivision (c), is invalid as a denial of the equal protection of the laws to minors insofar as it precludes the allowance of presentence conduct credit which would be allowed to adults convicted of either felonies or misdemeanors. Contrary to the holding of the majority, I would hold that the minor before us is entitled to 27 days of presentence conduct credit, as

well as to the 36 days of presentence custody credit recognized by the majority.

I would thus reverse the orders from which the appeal has been taken with instructions to the trial court to dismiss the petition.

JEFFERSON (Bernard), J.*

* Assigned by the Chairperson of the Judicial Council.

APPENDIX B

Los Angeles, Cal. APR 7 - 1950, 19

TITLE { Leo / Wells } No. 35263

PETITION FOR REHEARING DENIED

CLAY ROBBINS, *Clerk*

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

MAY 14 1980

I have this day filed Order

PETITION DENIED

In re: 2 Crim. *No.* 35263

People

vs.

David Levell W.

Respectfully,

G. E. BISHEL
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-

DAVID LEVELL W., a minor,)
)
Petitioner,)
)
v.)
)
THE STATE OF CALIFORNIA,)
)
Respondent.)

DECLARATION OF MAILING

(Rule 28.2)

I, STEFFAN IMHOFF, having been duly sworn, declare the following under penalty of perjury:

1. I am a member of the bar of the Supreme Court of the United States.

2. I represent the petitioner in the above-captioned case.

3. On July 9, 1980, a petition for writ of certiorari in the above-captioned case was placed in the first class mail at the Terminal Annex Post Office, Los Angeles, California, and addressed to:

Office of the Clerk
United States Supreme Court
Washington, D.C. 20543

Steffan Imhoff
STEFFAN IMHOFF
Deputy State Public Defender

Duly witnessed and sworn to before me, a Notary Public, this 9th day of July, 1980.

OFFICIAL SEAL
HAZEL B. GAVION
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires July 15, 1983

Hazel B. Gavion
NOTARY PUBLIC (or other notary notation)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-

DAVID LEVELL W., a minor,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the attached Motion for Leave to Proceed in Forma Pauperis, Affidavit in Support of Motion to Proceed in Forma Pauperis, and Petition for Writ of Certiorari by depositing the above in the United States Mail, postage prepaid and properly addressed to:

GEORGE DEUKMEJIAN
Attorney General's Office
Roy C. Preminger
Deputy Attorney General
3580 Wilshire Blvd., Room 800
Los Angeles, CA 90010

JOHN J. CORCORAN
County Clerk
For Del. to Hon. Terry J. Hatter, Jr., Judge
Criminal Courts Building
Los Angeles, CA 90012

JOHN K. VAN DE KAMP
District Attorney
Appellate Division
849 South Broadway
Los Angeles, CA 90014

CALIFORNIA COURT OF APPEAL
Second Appellate District
Division Four
3580 Wilshire Blvd.
Los Angeles, CA 90010

DAVID LEVELL WALLS
1804 S. Westmoreland
Los Angeles, CA

Dated this 9th day of July, 1980, at Los Angeles, California.

STEFFAN IMHOFF
Deputy State Public Defender
107 South Broadway, Suite 9111
Los Angeles, California 90012
Telephone: (213) 620-5469

80-5058

STATE OF CALIFORNIA

QUIN DENVIR, State Public Defender

Office of the State Public Defender

107 SOUTH BROADWAY, ROOM 9111
LOS ANGELES, CALIFORNIA 90012
(213) 620-5469

July 23, 1980

Michael Rodak, Jr.
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

In re: DAVID LEVELL W., petitioner, v. THE STATE OF CALIFORNIA, respondent
No. 80-5058

Dear Mr. Rodak:

Please be advised that on July 18, 1980, the California Supreme Court ordered that the above-captioned case (sub nomine People v. David W.) not be published in the Official California Reports. (Cal. Const., art. VI, section 14; rule 976, California Rules of Court.)

Sincerely,

STEFFAN IMHOFF
Deputy State Public Defender
Member, Bar of the Supreme Court of the United States

SI:jmm

cc: California Attorney General

Supreme Court, U.S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5058

DAVID LEVELL W., a minor,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

QUIN DENVIR
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Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5058

DAVID LEVELL W., a minor,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

On July 14, 1980, petitioner filed his Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis. That petition and motion are still pending before this Honorable Court.

Petitioner has on this date received a typeset copy of a law review article, that discusses the lower court's decision in his case, and will be published in the Criminal Justice Journal within the next several weeks. The article is entitled IN RE DAVID W.: A DEPARTURE FROM SCOTT K. IS ORDERED NOT PUBLISHED, and will be cited as 4 Crim. Just. J. _____ (1980). The article is attached as Appendix A of this supplemental brief. The petitioner requests that the Court consider this new material that

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was not available at the time that his petition was filed. (Rules of the Supreme Court, rule 22.6.)

DATED: November 12, 1980

Respectfully submitted,

QUIN DENVIR
State Public Defender

By _____
STEFFAN IMHOFF
Deputy State Public Defender

Attorneys for Petitioner

APPENDIX

AUTHOR'S CORRECTIONS

PRINTER'S ERRORS

IN RE DAVID W.: A DEPARTURE FROM *SCOTT K.* IS ORDERED NOT PUBLISHED

I. INTRODUCTION

The California Second District Court of Appeal recently addressed the issue of a parent's authority to curtail the constitutional rights of a minor child in the decision of *In re David W.*[1] It was argued that the minor's Fourth and Fourteenth Amendment rights had been violated when police officers, without probable cause, seized the minor and transported him to the police station for interrogation.[2] The court considered the rights of the minor and determined that no constitutional violation occurred when the parent had consented to the arrest on behalf of the child, recognizing a parent's " 'responsibility and authority for the discipline, training and control of his children.' "[3] In an unusual move, the California Supreme Court directed the Reporter of Decisions not to publish the opinion of the lower court.

II. BACKGROUND

A. *Constitutional Rights of Minors*

At common law children under seven were presumed to lack capacity "to form the requisite criminal intent."[4] Further, according to the equitable concept of *parens patriae*, children were assumed to be "wards of the state in need of special protection."[5] These two doctrines form the basis of the juvenile court philosophy.[6]

Since the juvenile justice system was originally conceived as a civil proceeding with an objective of rehabilitating and guiding wayward children, the constitutional guarantees for criminal pro-

1. In re David W., 103 Cal. App. 3d 469, 163 Cal. Rptr. 87 (1980), *reh. denied* (May 14, 1980) (reporter of decisions directed not to publish the opinion in the official reports July 18, 1980, by the California Supreme Court).

2. Appellant's Opening Brief to the First Appellate Court, submitted on October 15, 1979, to the California Second District Court of Appeals, at 5. Courtesy of Steffan Imhoff, Office of the State Public Defender, Los Angeles.

3. *Supra* note 1, at 475, 163 Cal. Rptr. at 91 (quoting Vandenberg v. Superior Court of Los Angeles County, 8 Cal. App. 3d 1048, 1055, 87 Cal. Rptr. 876, 880 (1970)).

4. C.E.B., California Juvenile Court Practice at 18 (1968).

5. *Id.*

6. *Id.*

AUTHOR'S CORRECTIONS

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ceedings were considered inapplicable. However, in 1967 in *In re Gault*,[7] the United States Supreme Court recognized certain rights of minors as fundamental in juvenile court proceedings. Gault, 15 years old, was taken into custody on a charge of making indecent phone calls.[8] In the Arizona Juvenile Court proceeding adequate notice of the charges was not provided, the charges were not explained to the parents, representation by counsel was not provided, and no transcript of the proceedings was made.[9] Gault was adjudicated a delinquent on the basis of an alleged admission of guilt.[10] The judge thereupon committed Gault to the state reformatory for the period of his minority, thus giving him a six-year sentence for a misdemeanor offense for which the Code provided a fine of $5 to $50 or not more than two months' imprisonment.[11]

In a sweeping decision, the United States Supreme Court held that the requirements of due process must be observed in the juvenile court. The notion that the state appears as *parens patriae*, and that the proceedings deal with custody and are civil in nature, ignores the reality that the minor is being deprived of his liberty and confined in an institution.[12] Accordingly, the Court ruled that juvenile court proceedings must include the following due process requirements: (1) the minor must be provided with written notice of the specific charge or factual allegations;[13] (2) the minor and his or her parents must be notified of the minor's right to be represented by counsel;[14] (3) the minor must be informed of the privilege against self-incrimination;[15] and (4) the minor must be provided with the right to confront and cross-examine witnesses.[16]

Separate opinions of three justices took sharp issue with some of the conclusions of the majority. In a concurring opinion, Justice Black declared that the holding "strikes a well-nigh fatal blow to much that is unique about the juvenile courts in the Nation."[17] Justice Stewart, in his dissent, insisted that "the Court's decision [was] wholly unsound as a matter of constitutional law, and sadly

7. In re Gault, 387 U.S. 1 (1967).
8. *Id.* at 4-5.
9. *Id.* at 5.
10. *Id.* at 7-8.
11. *Id.* at 8-9.
12. *Id.* at 27.
13. *Id.* at 33.
14. *Id.* at 41.
15. *Id.* at 55.
16. *Id.* at 57.
17. *Id.* at 60.

AUTHOR'S CORRECTIONS

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unwise as a matter of judicial policy."[18] He contended that the inflexible restrictions of adversary criminal trials have no place in juvenile courts, and that the due process requirements imposed on juvenile court proceedings by the majority opinion represented a step backward into the 19th Century. Justice Stewart stated that "a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act."[19]

In 1968, the California Second District Court of Appeal addressed the issue of which due process rights must be provided for minors charged with criminal offenses. In *In re M.G.S.*,[20] the minor had been declared a ward of the court because he was found to have committed robbery; he was committed to the California Youth Authority.[21] He contended on appeal that he had been deprived of his constitutional right to effective aid of counsel.[22]

In reversing the trial court's finding, the appellate court held that due process of law is a prerequisite to the constitutional validity of juvenile court proceedings "in which alleged misconduct may result in a determination of delinquency and commitment to a state institution."[23] The court further stated that it could not be seriously contended that the constitutional guarantee of due process of law does not extend to minors as well as to adults, reasoning: "'Surely, a minor charged in the juvenile courts with acts denounced by law as a felony does not have lesser constitutional, statutory rights or guarantees than are afforded an adult under similar circumstances in the superior court.'"[24] Thus, it would appear that when juveniles are charged with having committed criminal acts, they should be provided with the same constitutional and statutory protections as adults. However, as will be seen, the courts have never held that the rights of minors are coextensive with those of adults, even in the context of criminal charges. Currently, due process for minors charged with having

18. *Id.* at 78.
19. *Id.* at 79.
20. In re M.G.S., 267 Cal. App. 2d 329, 72 Cal. Rptr. 808 (1968).
21. *Id.* at 334-35, 72 Cal. Rptr. at 811.
22. *Id.* at 331, 72 Cal. Rptr. at 808.
23. *Id.* at 335-36, 72 Cal. Rptr. at 811.
24. *Id.* at 338-39, 72 Cal. Rptr. at 813 [quoting In re Contreras, 109 Cal. App. 2d 787, 790, 241 P.2d 631, 633 (1972)].

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committed criminal offenses requires the right to notice of charges, the right to counsel, the right to a speedy trial, and the right to confront and cross-examine witnesses—those rights mandated by the *Gault* decision. However, California, as well as many other jurisdictions, does not provide minors with the right to bail and the right to a jury trial.[25]

B. *Waiver of Constitutional Rights by Minor's Parents*

Once it is established that minors must be provided with many of the due process protections guaranteed to adults, a further question arises regarding which of these constitutional protections may be waived by the minor or his or her parents.

The courts have consistently held that minors may waive their own constitutional rights if the waiver is knowingly and intelligently made. The California Supreme Court in 1967 enunciated the "totallity of the circumstances" test for determining whether a minor's waiver of constitutional rights is valid. The court stated that the admissibility of a voluntary confession made by a minor "depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement."[26]

In addressing the issue of waiver of constitutional rights by minors, the California Third District Court of Appeal in *In re Robert H.*,[27] again enunciated the "totality of the circumstances" test. However, in the absence of a valid waiver, the court held that "minors may exercise their due process rights independently of, and indeed in opposition to, their parents."[28]

The issue of which constitutional and statutory rights of a minor may be waived by his or her parents was discussed by the California Supreme Court in 1977 in *In re Roger S.*[29] Roger was committed to a state mental hospital on application of his mother. Had Roger been an adult, procedural due process required in the

25. 6 WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 309, 310 (8th ed. 1974).

26. People v. Lara, 67 Cal. 2d 365, 383, 434 P.2d 202, 215, 62 Cal. Rptr. 586, 599 (1967).

27. In re Robert H., 78 Cal. App. 3d 894, 144 Cal. Rptr. 565 (1978).

28. *Id.* at 898, 144 Cal. Rptr. at 547.

29. In re Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977).

AUTHOR'S CORRECTIONS
PRINTER'S ERRORS
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Lanterman-Petris-Short Act (LPS)[30] would have required medical certification and a pre-petition finding that there was probable cause to believe the allegations of his mother. If the judge concurred with the findings, an evaluation would have been ordered to take place at a location convenient for Roger, at which physicians, attorneys and friends could have been present.[31] However, in Roger's case, the procedural protections provided under the LPS Act were not complied with; instead his mother applied for his commitment pursuant to the provisions of California Welfare and Institutions Code section 6000 (b) which provides for voluntary commitment of minors by their parents.[32] Roger appealed his commitment arguing that Section 6000 (b) did not afford procedural due process to minors because it permitted parents to "voluntarily" commit their children. He further argued that this procedure for commitment of minors denied such minors equal protection of the laws because it permitted their admission even though they were neither "gravely disabled" nor dangerous to themselves or others—findings which must necessarily be made before adults could be involuntarily committed.[33] The California Supreme Court noted that the United States Supreme Court had

30. CAL. WELF. & INST. CODE §§ 5000, et seq. (West 1972).

31. CAL. WELF. & INST. CODE § 5206 (West 1972) provides:

> Whenever it appears, by petition pursuant to this article, to the satisfaction of a judge of a superior court that a person is, as a result of mental disorder, a danger to others, or to himself, or gravely disabled, and the person has refused or failed to accept evaluation voluntarily, the judge shall issue an order notifying the person to submit to an evaluation at such time and place as designated by the judge. The order for an evaluation shall be served as provided in Section 5208 by a peace officer, counselor in mental health, or a court-appointed official. The person shall be permitted to remain in his home or other place of his choosing prior to the time of evaluation, and shall be permitted to be accompanied by one or more of his relatives, friends, an attorney, a personal physician, or other professional or religious advisor to the place of evaluation. If the person to receive evaluation so requests, the individual or individuals who accompany him may be present during the evaluation.

32. CAL. WELF. & INST. CODE § 6000 (West Supp. 1980) provides:

> [T]he medical director of a state hospital for the mentally disordered or developmentally disabled may receive in such hospital, as a boarder and patient, any person who is a suitable person for care and treatment in such hospital, upon receipt of a written application for the admission of the person into the hospital for care and treatment made in accordance with the following requirements:
>
> . . . .
>
> (b) In the case of a minor person, the application shall be made by his parents, or by a parent, guardian or other person entitled to his custody to any of such mental hospitals as may be designated by the Director of Developmental Services to admit minors on voluntary applications.

33. CAL. WELF. & INST. CODE § 5200 (West 1972) provides for the involuntary

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recently "reaffirmed the right of minors to constitutional rights and protection"[34] when it stated: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[35] On this basis, the *Roger S.* court concluded that "no interest of the state or of a parent sufficiently outweighs the liberty interest of a minor old enough to independently exercise his right to due process to permit the parent to deprive him of that right."[36] Thus, it was held that a parent could not waive a minor's right to procedural due process.

Dissenting to the majority opinion in *Roger S.*, Justice Clark argued against the expansion of procedural due process, stating that he did not believe that due process requires trial-type procedures. Rather, he was "convinced that the present system for commitment of minors could with very little modification meet appropriate standards."[37]

In *Vanderberg v. Superior Court of Los Angeles County*,[38] a father consented to a warrentless search of a bedroom jointly used by the father and his adult son. The son's motion to suppress was denied and the evidence discovered was admitted at the trial.

In affirming the father's right to consent to the search, the California Court of Appeal for the Second District found that "[i]n his capacity as the head of household, a father has the responsibility and authority for the discipline, training and control of his children."[39] In addition, the court concluded that "permitting an officer to search a bedroom in order to determine if his son is trafficking in narcotics . . . [appeared] a reasonable and necessary extension of a father's authority and control over his children's moral training, health and personal hygiene."[40] However, it would appear the decision could have been more firmly

commitment of "Any person alleged as a result of mental disorder, to be a danger to others, or to himself, or to be gravely disabled."

34. *Supra* note 29, at 927, 569 P.2d at 1290, 141 Cal. Rptr. at 302.

35. *Id.* [quoting Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74 (1976)].

36. *Id.* at 931, 569 P.2d at 1292, 141 Cal. Rptr. at 304.

37. *Id.* at 941, 569 P.2d at 1299, 141 Cal. Rptr. at 311.

38. Vandenberg v. Superior Court of Los Angeles County, *supra* note 3, at 1048, 87 Cal. Rptr. at 876.

39. *Id.* at 1055, 87 Cal. Rptr. at 880.

40. *Id.*

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grounded on the fact that the father and son shared the bedroom and, therefore, the father could consent to the search because it was his own bedroom.

C. *The Supreme Court Sets the Stage with Scott K.*

In 1979, the California Supreme Court took the opportunity to decide a similar issue to that raised in the *Vandenberg* decision. In *In re Scott K.*,[41] the court confronted the issue of parental consent to search a minor's room and its contents. Scott's father consented to the search of Scott's bedroom and a toolbox located therein.[42] The Supreme Court found that because the police knew that the father claimed no interest in the toolbox or its contents and acknowledged that the son was the owner, there was no justification for the police to rely on the father's consent to conduct the search or for their failure to seek the search warrant required by law.[43]

The Supreme Court acknowledged that the rights of juveniles are not identical in scope to the rights of adults and may be abridged when the curtailment serves the state's interest in the welfare of children.[44] However, the court further found:

> Search and seizure laws, however, hardly seem disruptive or otherwise inconsistent with the state's interest in child welfare. . . . [M]inors have a liberty interest that entitles them to due process whenever a state initiates action to deprive them of liberty. . . . Enforcement of search and seizure protection helps ensure that the factfinding process conforms with standards of due process.[45]

Recognition of the inherent right of parents to discipline and control their minor children was emphasized in the dissenting opinions in *Scott K.* Justice Clark's dissent insisted that when Scott's parents consented to the search of the toolbox, they were merely discharging their parental responsibilities. He felt the actions of Scott's parents did not violate Scott's constitutional right to be free from unreasonable searches and seizures. Further, the right of Scott's parents to discipline their child is also a constitutionally protected right which Justice Clark felt was violated by

41. In re Scott K., 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671 (1979).
42. *Id.* at 399, 595 P.2d at 107, 155 Cal. Rptr. at 673.
43. *Id.* at 405, 595 P.2d at 111, 155 Cal. Rptr. at 677.
44. *Id.* at 401, 595 P.2d at 108, 155 Cal. Rptr. at 674.
45. *Id.* at 402, 595 P.2d at 108-09, 155 Cal. Rptr. at 674-75.

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the majority's opinion.[46]

Although Justice Clark acknowledged that both juveniles and adults possess the right to be free from unreasonable searches and seizures, he felt that the rights of juveniles are not as extensive as those of adults and insisted that "parents have powers greater than those of the state to curtail a child's exercise of the constitutional right[] e may otherwise enjoy, for a parent's own constitutionally protected liberty interest includes the right to 'bring up children.' "[47] Justice Clark observed that Scott's parents "did not jeopardize [his] health or safety, nor did their actions 'have a potential for significant social burdens.' "[48] To the contrary, he felt that "the majority's decision [would] very likely have such deleterious effects by diminishing the authority of parents to discipline and control their children."[49]

Justice Richardson also dissented to the majority opinion in *Scott K.* It was his view that parents "have both the right and the responsibility to preserve the lawful nature of activities in their home."[50] It is their obligation to "control and eliminate any criminal activity in the home."[51] Justice Richardson further acknowledged that "parent have a legitimate purpose in seeking to ferret out the existence of any criminal activity conducted in any part of their home."[52] Their responsibility to themselves, and to the family, require that they do so. "Parents in certain situations have a right to be suspicious, and to act reasonably in accordance with those suspicions. They do not help their children if they do otherwise."[53]

Thus, although there were strong dissents, the California Supreme Court had ruled that minors were entitled to the full panoply of Fourth Amendment protections with regard to unreasonable searches and seizures. However, it was not clear when and under what circumstances parents may waive other constitutional rights of their children. It was against this background that

46. *Id.* at 405, 595 P.2d at 111, 155 Cal. Rptr. at 677.
47. *Id.* at 406, 595 P.2d at 111, 155 Cal. Rptr. at 677.
48. *Id.* at 406, 595 P.2d at 111, 155 Cal. Rptr. at 677 [quoting Wisconsin v. Yoder, 406 U.S. 205, 234 (1972)].
49. *Supra* note 41, at 406, 595 P.2d at 111, 155 Cal. Rptr. at 677.
50. *Id.* at 408, 595 P.2d at 113, 155 Cal. Rptr. at 679.
51. *Id.*
52. *Id.*
53. *Id.* at 409, 595 P.2d at 113, 155 Cal. Rptr. at 679.

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the case of *In re David W.*[54] arose.

III. FACTS IN *DAVID W.*

David W., age 13, had been previously charged with grand theft in a petition to the juvenile court under Welfare and Institutions Code section 602.[55] The juvenile court made a true finding and adjudged David a ward of the court. At the dispositional hearing,[56] David was placed at home on the condition that he comply with the conditions of probation. Thereafter, David's mother, suspecting that he had been involved in a burglary, contacted the local police station and informed them of her suspicions and stated that she was going to bring David to the station. When she failed to do so, two police officers were dispatched to go to the woman's home and inquire as to when she would be bringing her son in. The uniformed officers arrived at the residence at approximately 8:00 a.m. A young boy, age 10 to 12, answered the door and requested that they wait while he notified his mother of their presence. The boy returned and said, "My mother wants you to come in."[57] He directed them to a bedroom where the mother was lying in bed. The officers asked why she had not brought David to the station the day before, and she explained that she was having car trouble. When asked if she could bring him in to the station that day, she informed them that the car was still not working and stated, "Well, you officers are here. You can take him down."[58]

The mother then told David, who was in bed in the same room, to get out of bed and to get dressed because the officers were waiting for him. David complied. When he was dressed, he left with the police officers who, prior to placing David in the police car, handcuffed him to prevent him from jumping out of the vehicle while en route.[59]

At the station, the police officers advised David of his *Mi-*

54. *Supra* note 1.

55. CAL. WELF. & INST. CODE § 602 (West Supp. 1980) provides:

> Any person who is under age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

56. The disposition in a juvenile court proceeding is analogous to the sentence in a criminal court proceeding.

57. *Supra* note 1, at 472, 163 Cal. Rptr. at 89.

58. *Id.*

59. *Id.* at 473, 163 Cal. Rptr. at 90.

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randa rights. He waived his rights and confessed to the burglary. Based on the true finding of burglary of the second degree, the court set the maximum period of physical confinement at two years.[60]

IV. COURT OF APPEALS DECISION

On appeal, David contended that the forceable seizure of his body amounted to an illegal arrest since the police had neither probable cause nor his consent to arrest him. Consequently, his confession, as the fruit of the illegal arrest, should be suppressed.[61] The California Second District Court of Appeal rejected this contention, stating that no constitutional violation occurred when David and the police officers complied with the mother's request that he be taken to the station for investigation. Therefore, the trial court had properly denied the motion to suppress the minor's confession. The appellate court further stated that "under ordinary circumstances, absent the consent of a suspect, his transportation to the police station for investigation is tantamount to an arrest, thus calling into play the Fourth Amendment safeguards."[62] However, they concluded that David's lack of consent to the arrest was not at-issue because the officers had complied with the mother's request and David had "obeyed his mother, without protest."[63]

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."[64] In *Terry v. Ohio*,[65] the United States Supreme Court enunciated the test for determining whether a person has been "seized" for Fourth Amendment purposes: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[66] Even though David was not told he was under arrest, the fact that the police officers handcuffed him for

60. Appellant's Petition for Hearing, submitted on April 24, 1980, to the California Supreme Court, at 6. Courtesy of Steffan Imhoff, Office of the State Public Defender, Los Angeles.
61. Wong Sun v. United States, 371 U.S. 471 (1963).
62. *Supra* note 1, at 473, 163 Cal. Rptr. at 90.
63. *Id.*
64. U.S. CONST. amend. IV.
65. Terry v. Ohio, 392 U.S. 1 (1968).
66. *Id.* at 16.

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transportation to the station establishes a seizure for Fourth Amendment purposes when applying the test set forth in *Terry*. However, the majority in *David W.* found no violation of David's Fourth Amendment rights. The court felt that the police officers' actions were justified since they had made no demand of the minor requiring consent.[67] They testified that their purpose in visiting David's home was merely to ask his mother when she was going to bring David to the police station as she had stated she would do. They did not plan to question David. David's mother requested that the officers take David to the police station for interrogation. Nothing in the record indicated that the officers had suggested taking David to the police station or that they intended to do so prior to the mother's request.[68]

David argued that his Fourth Amendment rights could not be waived by his mother, relying on the recent holding of the California Supreme Court in *Scott K.*,[69] in which the court found that parents may not summarily waive their child's right to search and seizure protection.[70] However, the appellate court attempted to distinguish *Scott K.* by saying it was a narrow holding based upon the minor's proprietary interest in property. The court rejected David's contention that the *Scott K.* decision overruled sub silentio cases such as *Vandenberg* which recognized a parent's " 'responsiblity and authority for the discipline, training and control of his children.' "[71]

Although the court found that David had been "seized" when he was taken to the police station, they insisted that "the facts of this case are unusual, and our inquiry does not involve standard issues of consent or waiver of Fourth Amendment rights."[72] Rather, the court felt judicial deference to the "supervisorial authority and control of parents over their children"[73] was dispositive of the case. Thus, the appellate court reaffirmed its desire to recognize and acknowledge the supervisorial authority and control of parents of their children at the cost of a minor's constitutional rights.

67. *Supra* note 1, at 473, 163 Cal. Rptr. at 90.
68. *Id.*
69. *Supra* note 41.
70. *Id.* at 404, 595 P.2d at 110, 155 Cal. Rptr. at 676.
71. Supra note 1, at 475, 163 Cal. Rptr. at 91 (quoting Vandenberg v. Superior Court of Los Angeles County, *supra* note 3).
72. *Id.* at 473, 163 Cal. Rptr. at 90.
73. *Id.* at 474, 163 Cal. Rptr. at 91.

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Judge Jefferson dissented. He considered the majority's holding to be contrary to the current trend in the law which recognized that minors have some fundamental constitutional rights which cannot be waived by parents.[74] Among these rights is the right to procedural due process. He cited the United States Supreme Court for the proposition that " '[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.' "[75]

Judge Jefferson recognized the principle set forth in *Scott K.* that "'[b]y no means are the rights of juveniles coextensive with those of adults. . . . Minors' rights are often legitimately curtailed when the restriction serves a state's interest in promoting the health and growth of children.' "[76] He insisted that the California Supreme Court decision in *Scott K.* mandated a decision that David's Fourth Amendments rights had been violated; therefore, the fruits of this illegal arrest—David's confession—should be suppressed.

V. SUBSEQUENT COURT ACTION

On May 14, 1980, David's petition for hearing before the California Supreme Court was denied. Justices Tobriner and Newman were of the opinion that the petition should be granted. On July 18, 1980, the California Supreme Court directed the Reporter of Decisions not to publish the opinion in the official reports.[77] It would appear that even though the court denied hearing, it was not in agreement with the ruling in *David W.*

VI. IMPACT

The modern trend in the California courts is to recognize that minors have constitutional rights which parallel those accorded adults. However, this trend has caused conflicts due to the desire to retain the basic non-adversarial nature of juvenile court pro-

74. *Id.* at 479, 163 Cal. Rptr. at 94.

75. *Id.* at 479, 163 Cal. Rptr. at 94 (quoting Planned Parenthood of Missouri v. Danforth, *supra* note 35).

76. *Id.* at 480, 163 Cal. Rptr. at 94 (quoting In re Scott K., *supra* note 41, at 401, 595 P.2d at 108, 155 Cal. Rptr. at 674.

77. A Writ of Certiorari was pending before the United States Supreme Court at the time this article went to press.

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ceedings and to recognize the fundamental parental right to discipline and control their minor children.

The California Supreme Court in *Scott K.* recognized that Fourth Amendment rights regarding searches and seizures may not be waived by parents. The court insisted that "minors have a liberty interest that entitles them to due process whenever a state initiates action to deprive them of liberty."[78] However, in David's case, the Second District Court of Appeal recognized as valid a waiver, by his mother, of his right to a lawful arrest. It appears that the court based its opinion upon the reasonableness of the police officers' actions. David had been in trouble before and his mother was concerned about him. The police officers were merely complying with the mother's request. However, this somewhat simplistic analysis seems to fly in the face of well-established Fourth Amendment requirements that arrests must be based on probable cause and the recent United States Supreme Court decision that a person may not be arrested in his home absent consent, a warrant, or probable cause plus exigent circumstances.[79] In David's case, there was no warrant; nor was there probable cause or exigent circumstances justifying his arrest. The remaining issue was whether David's mother's consent amounted to a valid waiver of his constitutional rights. It would appear that, based on the "totality of the circumstances."[80] David did not consent to the arrest. And, in light of *Scott K.*, no amount of convoluted reasoning can justify permitting a parent to waive the Fourth Amendment rights of minor children.

Although the California Supreme Court decided not to hear the case of *David W.*, by ordering that the opinion not be published, they have effectively eliminated any impact it might have had. In effect, they have reversed the decision sub silentio and have sent a message to the California district courts of appeal that the *Scott K.* decision is not to be limited in its application.

VII. CONCLUSION

The courts seem unwilling to decide which constitutional rights, if any, may be waived by parents. This issue need to be clarified. At present, it appears that constitutional rights of mi-

78. *Supra* note 41, at 402, 595 P.2d at 109, 155 Cal. Rptr. at 675.
79. Payton v. New York, — U.S. —, 100 S. Ct. 1371 (1980).
80. *Supra* note 26.

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nors may be waived in some circumstances when reasonable for the purpose of discipline and control. However, apparently other constitutional rights are such a fundamental part of due process that a parent will not be permitted to waive them on behalf of a minor child. Even should it be determined which rights a parent may waive for his or her minor child, the issue remains: who will decide the circumstances under which parental waiver is reasonable?

*Gaylla A. Parish**

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5058

DAVID LEVELL W., a minor,
Petitioner,
v.
THE STATE OF CALIFORNIA,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the attached Supplemental Brief in Support of Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District by depositing the above in the United States Mail, postage prepaid and properly addressed to:

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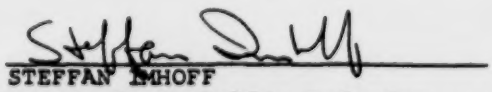

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NO. 80-5058

IN THE

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October Term, 1980

DAVID LEVELL W., a minor,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAVID LEVELL W., a minor,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

The issue is whether petitioner's Fourth Amendment rights were violated when police officers took him from his home to the police station for questioning after petitioner's mother told the officers to take petitioner and also told petitioner to accompany the officers.

* * * * * *

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OPINION BELOW

On March 18, 1980, the Court of Appeal of the State of California, Second Appellate District, Division Four, one justice dissenting, rendered on opinion herein in Case 2d Crim. No. 35263, affirming the judgment of the Juvenile Court of Los Angeles County Superior Court. The Juvenile Court had sustained a petition which alleged that petitioner had committed the felony of burglary, in violation of California Penal Code section 459. On April 7, 1980, the same Court of Appeal issued an order denying petitioner's petition for a rehearing. Copies of the opinion of the Court of Appeal and the order denying a rehearing are contained in Appendices A and B to the petition for writ of certiorari filed with this Honorable Court by petitioner.

On May 14, 1980, the Supreme Court of the State of California denied petitioner's petition for hearing without opinion. A copy of the order of denial is contained in Appendix C to the petition for writ of certiorari.

The opinion of the Court of Appeal was originally published at 103 Cal.App.3d 469. Pursuant to California Rules of Court, Rule 976, the California Supreme Court ordered the opinion depublished on July 18, 1980. A copy of the depublication order is attached hereto as an Appendix.

JURISDICTION

The ground for jurisdiction of this Honorable Court is set forth on page 2 of the petition.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED IN THE CASE

Respondent cites the following constitutional provisions and statute in its Argument:

1. The United States Constitution, Amendment IV, provides in pertinent part that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..."

2. The United State Constitution, Amendment XIV, provides in pertinent part that:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

3. California Penal Code section 836, provides in relevant part:

"A peace officer . . . may . . . without a warrant, arrest a person:

". . . .

"2. When a person arrested has committed a felony, although not in his presence.

"3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

STATEMENT OF THE CASE

On March 1, 1979, Tommy Harris lived at 706 East 48th Street, apartment 1, in Los Angeles. He left his apartment at about 5:00 p.m. that day after the locking premises. He returned home about 10:00 p.m. the same day and saw that the bars on one of his windows had been cut off and that the window pane was broken. He also determined that a box of change containing about $10 to $20 had been taken from inside his apartment. (RT 34-35.)

After Mr. Harris had determined that the box of change was missing from his apartment, he called the police. He subsequently told the police what had been taken from his

apartment. (RT 36.)

Mr. Harris had not given petitioner or another young man named Cornell permission to be in his apartment on March 1, 1979. Prior to that date, Mr. Harris had been acquainted with petitioner. Both petitioner and the young man named Cornell had been inside Mr. Harris' apartment before the date in question. (RT 35-36.)

Gregory Johnson is a City of Los Angeles police officer. On March 8, 1979, Officer Johnson and his partner Officer Tyler were contacted by Los Angeles Police Officer Tietgen. Officer Tietgen told Officers Johnson and Tyler that he had been in contact with the mother at a residence at 674 East 48th Street in Los Angeles concerning one of her children who allegedly had been involved in the burlary of a house down the street. Officer Tietgen stated that the mother was supposed to bring her son to the Newton Street Police Station the day before but she had failed to do so. Therefore, Officer Tietgen asked Officers Johnson and Tyler to go to 674 East 48th Street and attempt to contact the mother to find out when she would bring her son to the station. (RT 38-39, 54.)

After speaking with Officer Tietgen, Officers Johnson and Tyler drove to the residence at 674 East 48th Street in Los Angeles. They arrived there about 8:00 a.m. They were in uniform and drove a marked police vehicle. (RT 38-39.)

Officers Johnson and Tyler walked up to the front door of the residence and knocked. A boy who appeared to be ten to twelve years old answered the door. The officers told the boy who they were and said that they would like to speak with the boy's mother. The boy told the officers to wait a minute and he then left the front door. About a minute later the boy returned to the front door and told the officers, "My mother wants you to

come in." The officers then entered the residence. (RT 40-41.)

The officers followed the boy into a bedroom where the boy said his mother was. Upon entering the bedroom, Officer Johnson saw a woman lying in bed. The boy said the woman was his mother. Officer Johnson then told the woman that he and his partner were there to talk to her about her son who was supposed to have come down to the Newton Street Police Station the day before. Officer Johnson said they were wondering why the woman had not brought her son to the station the day before and they wanted to know when she was going to bring him. The woman said her car had broken down and she was unable to bring in her son. Officer Johnson asked where the woman's son was. The woman pointed to another bed in the same room and said, "He's there." Officer Johnson observed that petitioner was in the other bed and was covered with a sheet. Officer Johnson asked petitioner's mother whether she could bring petitioner to the station that same day. Petitioner's mother replied that her car was still not working. She looked over to petitioner and said, "David, wake up." Petitioner then starting getting out of bed. (RT 41-42.)

Officer Johnson and his partner continued talking with petitioner's mother about when she would be able to bring petitioner to the station. Petitioner's mother said, "Well, you officers are here. You can take him down." Petitioner's mother also said she had been having trouble with petitioner. She stated that if he had been involved in the burglary under investigation she wanted to know about it because she was going to contact the probation officer and she did not want petitioner back in the house. (RT 43.)

Petitioner's mother told the officers to take petitioner to the police station. She also told petitioner to get out of bed and get dressed because the officers were waiting for him.

Petitioner got out of bed. His mother told him to hurry up and get going. Petitioner got dressed. Petitioner then exited from the house and got into the police car with the officers. The officers never told petitioner he was under arrest. After petitioner got into the police car, Officer Johnson handcuffed him because he did not want to take a chance that petitioner might escape or jump out of the car while it was in motion. (RT 43-44.)

Officer Johnson and his partner drove petitioner to the Newton Street Police Station. After arriving at the station, Officer Johnson advised petitioner of his constitutional rights. Petitioner said he understood his constitutional rights. He waived his rights and said he did not want his parents present during questioning. Petitioner was also advised of his constitutional rights by Officer Tietgen at the station. Petitioner told Officer Tietgen that he understood his rights and that he waived them. (RT 45-49, 57-59.)

After petitioner had been advised of and waived his constitutional rights, he said that he and a boy named Cornell had used bolt cutters to cut the bars off the window at Tommy Harris' apartment and that Cornell then went through the window to look for marijuana and stuff while petitioner remained outside as a lookout. Petitioner related that thereafter Cornell exited the apartment through the window carrying a cigar box full of quarters, pennies, nickles and dimes. Petitioner and Cornell then went to the liquor store at 51st and Avalon where they cashed in the coins. Cornell subsequently took the bolt cutters and went to his "old lady's" house and petitioner went home. (RT 49-50.)

After petitioner had waived his rights, Officer Tietgen asked him if he knew what right and wrong were and whether he

knew that taking something from someone else is wrong. Petitioner replied, "Yeah, I know it's wrong. It's petty theft." Petitioner further told Officer Tietgen that someone else had broken into the victim's house, that there were bars on the window of the victim's house and that the house was stucco. (RT 54, 58-59.)

SUMMARY OF RESPONDENT'S ARGUMENT

The Petition for Writ of Certiorari should be denied. Petitioner's mother had legal authority to give the police officers permission to take petitioner to the police station for questioning. Moreover, petitioner manifested his consent to accompanying the officers to the station. Therefore, it was proper for the officers to take petitioner to the station and evidence of the confession petitioner made at the station was admissible.

ARGUMENT

THE POLICE OFFICERS LAWFULLY TOOK PETITIONER TO THE POLICE STATION

Petitioner contends that his mother had no legal authority to consent to the police taking him to the police station since the police had neither probable cause nor a warrant to arrest him. Therefore, petitioner maintains his being taken from his house to the police station by the police officers constituted an unlawful arrest in contravention of his Fourth Amendment right not to subjected to an unreasonable seizure of his person. (Petn. 6-11.) Respondent disagrees and submits, for the reasons set forth below, that the police officers acted lawfully by taking petitioner from his home to the police station.

It is true that the police officers did not have a warrant for petitioner's arrest at the time they took him from

his home to the police station. It is also true that the prosecution did not establish at petitioner's adjudication hearing that the police then had probable cause to arrest petitioner without a warrant. (See Cal. Pen. Code, § 836; RT 54-57.) However, Officers Johnson and Tyler nevertheless lawfully took petitioner from his home to the police station for questioning because, contrary to petitioner's assertion, petitioner's mother had lawful authority to instruct the officers to take petitioner to the police station.

It was only because petitioner's mother's car had broken down that she had not previously brought petitioner to the police station and was unable to bring him to the station on the date the officers came to her and petitioner's house. There was no other reason. (RT 42.) In the exercise of her parental right to care for, discipline and control petitioner's upbringing and behavior, a liberty interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution, petitioner's mother herself lawfully could have brought petitioner to the police station at any time she saw fit. Consequently, there was nothing unlawful or improper about her telling Officers Johnson and Tyler to take petitioner to the station and her telling petitioner to accompany the officers.[1/]

Even where there is an invasion of a protected freedom, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. (Ginsberg v. New York (1968) 390 U.S. 629, 638; Prince v. Massachusetts (1944) 321 U.S. 158, 170.) Furthermore, parents have powers greater than those of the state to curtail their minor child's

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1. At the time petitioner's mother told the police to take petitioner to the station, petitioner was 13 years old. (CT 8.)

exercise of the constitutional rights the child may otherwise enjoy; a parent's own constitutionally protected liberty includes the right to bring up his or her children (Meyer v. Nebraska (1923) 262 U.S. 390, 399), and to direct the upbringing and education of his or her children. (Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535.) As against the state, this parental duty and right is subject to limitations only if it appears that parental decisions will jeopardize the health and safety of the child, or have a potential for significant social burdens. (Wisconsin v. Yoder (1972) 406 U.S. 205, 234.) As noted by this Honorable Court in Prince v. Massachusetts, supra (1944) 321 U.S. 158, 166, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

As this Court also recently recognized, this nation's jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is the mere creature of the state and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare their children for additional obligations. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children. (Parham V. J. R. (1979) 442 U.S. 584, 602.)

In the case at bench, petitioner's mother, in the

exercise of her federal constitutional right as well as her moral duty and legal responsibility to control petitioner's upbringing, gave the police permission to take petitioner to the police station for questioning. This action by petitioner's mother was eminently reasonable under the circumstances and was not an action such as to jeopardize petitioner's health and safety but rather was in petitioner's best interest. Giving the police permission to take petitioner to the police station for questioning was a reasonable and necessary extension of petitioner's mother's authority and control over petitioner's moral training, health and well being.

In taking petitioner to the police station, the police officers merely acted as an agent of petitioner's mother by following her instructions. Therefore, the officers acted lawfully and reasonably by taking petitioner from his home to the station and did not illegally arrest or detain petitioner.

The action of the police officers in taking petitioner to the police station was lawful for the additional reason that petitioner manifested his consent to accompanying the officers. The evidence was undisputed that the police officers never asked or commanded petitioner to accompany them to the police station. Rather, after the officers, while in petitioner's and his mother's home, had asked petitioner's mother when she would be able to bring petitioner to the police station for purposes of investigation, petitioner's mother said that since the officers were there at the house they could take petitioner to the station. She also told petitioner to get out of bed, to get dressed, to hurry up and to go with the officers. Petitioner then got dressed and accompanied the officers to the station. (RT 42-44.)

In the absence of any evidence whatsoever that

petitioner objected to going to the police station with the officers[2], the only rational conclusion from the evidence presented below is that petitioner voluntarily consented to accompanying the officers. Just as a person's consent to a search by the police obviates the necessity for a search warrant or probable cause (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 219), so too should the consent of a person to being taken to the police station by the police for investigation obviate the necessity for an arrest warrant or the requirement of probable cause for an arrest.

In re Scott K. (1979) 24 Cal.3d 395, 155 Cal.Rptr. 671, 595 P.2d 105, relied on by petitioner in support of his argument, is distinguishable from the case at bench. In the In re Scott K., case, a police officer searched a locked tool box belonging to the minor defendant without consent of the minor but with the consent of the minor's father. The search disclosed marijuana inside the tool box. The California Supreme Court held that the search was unlawful because it violated the minor's property rights and the minor's father had no legal right to consent to the search because he had no property interest in the tool box. In the present case, however, the police action in taking petitioner to the police station took place with the consent of both petitioner's mother and petitioner. Petitioner manifested his consent to accompanying the officers to the station by obeying his mother's direction to accompany the officers.[3]

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2. Petitioner makes no claim that he did not voluntarily accompany the officers.

3. The police action in the instant case occurred on March 8, 1979. (RT 38-39.) The opinion in In re Scott K.

Dunaway v. New York (1979) 442 U.S. 200, another case cited by petitioner, is also inapposite to the instant case. In Dunaway it was held that for purposes of the Fourth Amendment prohibition against unreasonable searches and seizures, an individual who is taken into custody by police, transported to the police station without being told he is under arrest, and detained at the police station for interrogation, is "seized" in the Fourth Amendment sense when he is involuntary taken to the police station. (Dunaway at p. 207.) However, in the present case petitioner voluntary and consensually accompanied the police officers to the station pursuant to his mother's instructions.

In view of the foregoing, petitioner was neither illegally arrested nor detained. The police officers lawfully took petitioner to the police station and, therefore, evidence of the confession petitioner made at the station was properly introduced against petitioner. To hold to the contrary surely would be an ultimate example of sparing the rod and spoiling the child.

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was filed on May 25, 1979. (See In Re Scott K., 24 Cal.3d at p. 395, 155 Cal.Rptr. at 671, 595 P.2d at 105.) The holding of In re Scott K. pertaining to the scope of a parent's right to consent to a search of his minor child's private property only applies prospectively from and after the date of the opinion in the case. (In re Joe R. (1980) 27 Cal.3d 496, 511-512, 165 Cal.Rptr. 837, 846-847, 612 P.2d 927, 936-937.) Therefore, not only is the rationale of In re Scott K. inapplicable to the police action in the case at bar, but is also under California law as well as Federal law, the action by the police was lawful.

CONCLUSION

For the foregoing reasons, it is requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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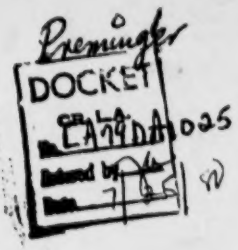
APPENDIX



2nd Crim. No. 35263

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE DAVID W., A PERSON COMING UNDER THE JUVENILE COURT LAW

PEOPLE
v.
DAVID W.

SUPREME COURT
FILED
JUL 18 1980
LAURENCE P. GILL, Clerk
Deputy

The Reporter of Decisions is directed not to publish in the Official Reports the opinion in the above entitled proceeding filed March 18, 1980 which appears at 103 Cal. App. 3d 469. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.)

Bird
Chief Justice